(8)

Supreme Court, U.S.
FILED
MAR 2 1994
OFFICE OF THE CLERK

No. 93-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONER

JAMES VOGT
REYNOLDS, RIDINGS, VOGT & MORGAN
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131
Counsel of Record

-and-

RICHARD GERARD
Manufacturers Hanover Leasing Corporation
270 Park Avenue, 40th Floor
New York, NY 10017
(212) 270-5026
Counsel for Petitioner

March 2, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

RULE 29.1 STATEMENT

Petitioner, Manufacturers Hanover Leasing Corporation ("Manufacturers Hanover"), previously disclosed the required information in its Petition for Writ of Certiorari filed on January 27, 1994.

TABLE OF CONTENTS

Page

RULE 29.1 STATEMENT i

TABLE OF AUTHORITIES iv

POINT ONE

RULE 10.1(c) OF THE SUPREME COURT RULES PROVIDES THE BASIS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI 1

POINT TWO

THE *DEPRIZIO* RATIONALE HAS NOT BEEN ADOPTED BY EVERY CIRCUIT COURT WHICH HAS CONFRONTED THIS ISSUE AS THE RESPONDENT SUGGESTS 3

POINT THREE

RESPONDENT'S BRIEF SUPPORTS PETITIONER'S CONTENTION THAT THE TENTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF § 547 IS INCONSISTENT 5

CONCLUSION 6

TABLE OF AUTHORITIES

	Page
In re Compton Corp., 831 F.2d 586 (5th Cir. 1987), *on rehearing*, 835 F.2d 584 (1988)	3
Dewsnup v. Timm, 112 S. Ct. 773 (1992)	5
In re Erin Foods Services, Inc., 980 F.2d 792 (1st Cir. 1992)	4
Harman v. First American Bank of Maryland, 956 F.2d 479 (4th Cir. 1992)	4
Matter of Southmark Corp., 993 F.2d 117 (5th Cir. 1983)	3
In re Suffola, Inc., 2 F.3d 977 (9th Cir. 1993)	4
In re T. B. Westex Food, Inc., 950 F.2d 1187 (5th Cir. 1992)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1213

MANUFACTURERS HANOVER LEASING CORPORATION,
Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONER

POINT ONE

RULE 10.1(c) OF THE SUPREME COURT RULES PROVIDES THE BASIS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Despite the Respondent's contention that Rule 10.1(a) of the Supreme Court Rules is the only applicable reason for granting the Petition, Petitioner submits that Rule 10.1(c) applies regardless of whether Respondent's contention that no conflict exists among the circuits is correct. The Petition presents an important question of federal law that Respondent concedes has created considerable conflict in the lower courts which should be settled by the Supreme Court. The reasons listed in Rule

10.1 are not exclusive but rather outline basic reasons for granting certiorari.[1]

The importance of this issue is underscored by the five *amicus* briefs submitted by major national business organizations. These five organizations are:

> Commercial Finance Association, Inc.;
> The American Council of Life Insurance;
> American Bankers Association;
> The New York Clearing House Association; and
> Equipment Leasing Association of America, Inc.

Both the number and dollar amount of financial transactions involving the members of these diverse organizations where an insider has guaranteed the indebtedness is staggering. Because most of the members of these organizations conduct business on a nationwide basis, it is important that the Supreme Court grant the Petition in this case and resolve the uncertainty on this issue as it relates to each of these members' businesses. (*See* Petition at page 13). The need for uniformity in bankruptcy law on a nationwide basis cannot be overstated. This is most eloquently expressed by the Commercial Finance Association in its *amicus* brief at page 7 at which it concludes:

> In sum, the conflict over *Deprizio* is deep and wide, and can only be resolved by a decision of this Court. No good reason exists to postpone the inevitable—review by this Court—and allow the conflicting interpretations of the Bankruptcy Code to distort lending practices, or worse, to serve as a trap for lending institutions that do not accurately predict whether *Deprizio* will apply to their transactions.

---

[1] *See* Commercial Finance Association, Inc.'s *amicus* brief at page 5. "Thus, the Court's ordinary preference for a circuit conflict to justify certiorari ought not to be slavishly adhered to in this case, where the division among the lower courts plainly exists and causes a serious disruption in the primary commercial activity of banks and other lending institutions."

POINT TWO

THE *DEPRIZIO* RATIONALE HAS NOT BEEN ADOPTED BY EVERY CIRCUIT COURT WHICH HAS CONFRONTED THIS ISSUE AS THE RESPONDENT SUGGESTS.

In his Brief in Opposition, Respondent represents that no conflict exists in the circuit courts and that five circuit courts which have "faced" the issue of the expanded preference period as to noninsider creditors have decided it in the same way. Therefore, Respondent contends that one can assume that any subsequent circuit court of appeals deciding a similar case will decide the issue in the same manner. (*See* page 3 of Brief in Opposition). Petitioner respectfully disagrees with the representations of the Respondent.

Respondent contends that the Fifth Circuit Court of Appeals has followed the *Deprizio* rationale in the *Matter of Southmark Corp.*, 993 F.2d 117 (5th Cir. 1993). Respondent is incorrect. A thorough analysis of *Southmark* clearly reveals that the Fifth Circuit Court of Appeals decided *Southmark* on a narrow issue and did not adopt the entire *Deprizio* rationale. The Fifth Circuit only decided the limited issue of whether § 547(b) required a nexus between the insider's claim and the debt underlying the transfer without reaching the threshold issue as outlined in *Deprizio*. *Id.* at 119. The Fifth Circuit could have followed the *Deprizio* rationale, thereafter disposing of the appeal as it did. Instead, the Fifth Circuit limited its holding to the more narrow issue. This is clear from its statement that only the *Deprizio* court discussed the nexus requirement, expressly omitting the other two circuits which followed *Deprizio*, but which did not discuss the nexus requirement. *Id.* at 120 n.4. In fact, the Fifth Circuit has indicated that it might not follow the *Deprizio* decision acknowledging the tension between its decision adopting the two transfer theory in *In re Compton Corp.*, 831 F.2d 586 (5th Cir. 1987) *on rehearing*, 835 F.2d 584 (1988) and the *Deprizio*

decision. *See In re T. B. Westex Food, Inc.*, 950 F.2d 1187, 1193-94 (5th Cir. 1992).

Like the Respondent, the Ninth Circuit Court of Appeals also incorrectly assumed that the Fifth Circuit Court of Appeals had followed *Deprizio* when it referenced the *Southmark* and *Westex* decisions in its opinion. *In re Suffola, Inc.*, 2 F.3d 977 (9th Cir. 1993). *Westex* expressly disclaims that it follows *Deprizio*, noting that its facts are entirely different in that they do not involve a guaranty held by a noninsider but rather payment on an insider's debt to a garnishee. *Westex*, 950 F.2d at 1194. Again, Petitioner disagrees with both the Respondent and the Ninth Circuit in its interpretation of the Fifth Circuit's decisions on *Deprizio*.

The First Circuit Court of Appeals also was presented with the insider guaranty issue in the case of *In re Erin Foods Services, Inc.*, 980 F.2d 792 (1st Cir. 1992). Rather than adopting the *Deprizio* rationale in its entirety allowing the First Circuit Court of Appeals to quickly dispose of the matter, it elected to circumvent the controversial issue and chose to decide the case on a more limited basis leaving the subject of whether *Deprizio* was correct or incorrect to another day. *Id.* at 798. In addition, the Fourth Circuit Court of Appeals acknowledged that the *Deprizio* decision was very "controversial" and had received "mixed critiques" and elected not to "comment on the viability of the theory." *Harman v. First American Bank of Maryland (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 483 (4th Cir. 1992).

Thus, three circuit courts have expressly avoided deciding the *Deprizio* issue when confronted by it. It is sheer oversimplification for the Respondent to claim that other circuit courts will follow *Deprizio* given the substantial disagreement among the lower courts.

Respondent's final argument is that there is an absence of intellectual breadth to the cases which disagree with

Deprizio. This is obviously not the case. Otherwise, the mountain of jurisprudential scholarship would not have been created on this issue.

POINT THREE

RESPONDENT'S BRIEF SUPPORTS PETITIONER'S CONTENTION THAT THE TENTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF § 547 IS INCONSISTENT.

Despite the Respondent's support of the so-called "plain meaning" interpretation of § 547 of the Bankruptcy Code, his Brief in Opposition corroborates Petitioner's contentions. Respondent acknowledges that § 547(c) defenses are available to both the insider creditor and the noninsider creditor. (*See* page 7 of Brief in Opposition). Thus, Respondent essentially acknowledges that Manufacturers Hanover Leasing could argue any defenses available under § 547(c), yet could not argue any defenses under § 547(b), and in particular § 547(b)(4)(A) providing that transfers to noninsider creditors more than 90 days prior to the petition in bankruptcy cannot be avoided. Yet, the Respondent can cite to no statutory provision which denies a noninsider creditor its § 547(b)(4)(A) defense.

The Respondent cites to § 547(g) to support his statement that § 547(b) and (c) are two separate tests. However, § 547(g) does not provide separate tests. Rather, it only provides that the trustee has the burden of proof as to the elements of § 547(h), whereas the creditor has the burden of proof as to the elements of § 547(c).

This same inconsistent approach by the Tenth Circuit Court of Appeals in allowing § 547(c) defenses but denying § 547(b)(4)(A) defenses to noninsider creditors underscores the problem with the Tenth Circuit's interpretation of § 547 and the need for review by this Court of a "radical departure" from pre-Code law based on an ambiguous statute. *Dewsnup v. Timm*, 112 S. Ct. 773 (1992).

CONCLUSION

The Respondent's claim that there is unanimous acceptance of the *Deprizio* rationale by the circuit courts of appeals is unfounded. The continued refusal of lower courts to follow the *Deprizio* rationale, the uncertainty created in several circuits because of the circuit court's decision not to adopt *Deprizio* and decide the case on a narrow issue, and the request of major finance and trade organizations that the Court grant the Petition for Writ of Certiorari in this proceeding are compelling reasons for the Supreme Court to grant the Petition.

Respectfully submitted,

JAMES VOGT
REYNOLDS, RIDINGS, VOGT
& MORGAN
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131
Counsel of Record

-and-

RICHARD GERARD
Manufacturers Hanover
Leasing Corporation
270 Park Avenue, 40th Floor
New York, NY 10017
(212) 270-5026
Counsel for Petitioner

March 2, 1994